

**Shore Health Care Center, Inc. t/a Fountainview
Care Center and 1199J National Union of Hos-
pital and Health Care Employees, AFSCME,
AFL-CIO, Petitioner. Case 4-RC-18231**

June 16, 1997

**DECISION AND DIRECTION OF SECOND
ELECTION**

BY CHAIRMAN GOULD AND MEMBERS FOX
AND HIGGINS

The National Labor Relations Board has considered an objection to an election held October 24, 1996, and the Regional Director's report recommending disposition of it. (Pertinent portions are attached as an appendix.) The election was conducted pursuant to a Stipulated Election Agreement. The revised tally of ballots shows 32 for and 32 against the Petitioner, with no challenged ballots.¹

The Board has reviewed the record in light of the exception and briefs, has adopted the Regional Director's findings and recommendations, and finds that the election must be set aside and a new election held.

We agree with the Regional Director that the Employer acted in bad faith, or with gross negligence, in conjunction with its omission of the names of four employees from the eligibility list, and thus engaged in objectionable conduct by failing to substantially comply with the requirements of *Excelsior Underwear*, 156 NLRB 1236 (1966).²

Evidence of bad faith or gross negligence is not required in order to find objectionable an employer's failure to comply with the *Excelsior* requirements. See *Thrifty Auto Parts*, 295 NLRB 1118 (1989); and *Gamble Robinson Co.*, 180 NLRB 532 (1970). However, in circumstances where the omission of names from the list is the result of conduct demonstrating bad faith or gross negligence on the part of an employer, such conduct is a relevant consideration in determining whether the employer has failed to comply with the *Excelsior* rule.

Here, the Employer was found to have omitted the names of four employees from the eligibility list. Although this constituted little more than 5 percent of the eligible voters, the Employer's decision to leave their names off the eligibility list was not the result of a good-faith mistake. As noted by the Regional Director,

¹ The original tally of ballots showed 32 for and 26 against the Petitioner, with 6 challenged ballots. Pursuant to a stipulation executed by the parties to resolve the challenged ballots, the ballots were opened and counted and the above revised tally of ballots was made available to the parties.

² We note that the Regional Director described the Employer's decision to leave the names off of the eligibility list as one that "was not the result of a good-faith mistake." This description, in our view, is tantamount to a finding that the Employer acted in bad faith or with gross negligence.

the parties entered into a Stipulated Election Agreement that included recreational aides in the bargaining unit. Thereafter, the Employer contended that it employed no recreational aides. The Employer subsequently acknowledged that it employed four activities assistants who performed the same duties as those of recreational aides, but further contended that it considered them professional employees who were to be excluded from the unit. One of the Employer's supervisors, however, told two of the activities assistants that they were eligible voters and should vote pursuant to the challenged ballot procedure. After the election, the Employer admitted that the activities assistants were, in fact, the same as recreational aides.

The above conduct demonstrates that the Employer did not act in good faith in omitting the names of the four recreational aides from the eligibility list. In these circumstances, the Employer's conduct constitutes a failure to substantially comply with the *Excelsior* rule. Accordingly, we shall sustain the Petitioner's objection and set aside the election.³

[Direction of Second Election omitted from publication.]

CHAIRMAN GOULD, concurring.

I agree with my colleagues that the Employer's omission of four names from the *Excelsior* list warrants setting aside the election. In my view, the omission of names from the *Excelsior* list constitutes objectionable conduct where, as here, the omitted employees were determinative votes.¹ In such circumstances, the potential harm from the omission is prejudicial to the union's ability to present its position to all unit employees. Accordingly, I believe, unlike my colleagues, that there is no need here to determine whether the Employer acted in bad faith, or with gross negligence, in omitting the names from the list.

In *Excelsior Underwear*, the Board established the rule that, in all election cases, an employer must file an election eligibility list containing the names and addresses of all eligible voters.² The *Excelsior* rule was adopted for the express purpose of ensuring that all employees be "exposed to the arguments for, as well

³ We find inapplicable *Kentfield Medical Hospital*, 219 NLRB 174 (1975); and *Advance Industrial Security*, 230 NLRB 72 (1977), cited by the Employer in support of its contention that its omission of the four names does not warrant setting aside the election. Unlike the instant case, there was no finding in those cases that the omission of names from the eligibility list was the result of conduct demonstrating bad faith or gross negligence by the respective employers.

¹ The original tally of ballots showed 32 for and 26 against the Petitioner, with 6 challenged ballots. The challenged ballots included the ballots of the four employees whose names were omitted from the *Excelsior* list. Thereafter, pursuant to a stipulated resolution of the challenged ballots, the challenged ballots were opened and counted, and the revised tally showed a vote of 32 to 32.

² *Excelsior Underwear*, 156 NLRB 1236, 1239-1240 (1966).

as against, union representation.”³ The Board recognized the practical necessity for the rule, contrasting the employer who has a continuing opportunity to present its views regarding unionization to employees with the petitioner “whose organizers normally have no right of access to plant premises.”⁴

The Supreme Court approved the rule, stating that the disclosure requirement furthers the statutory goal of ensuring the fair and free choice of bargaining representatives “by encouraging an informed electorate and by allowing unions the right of access to employees that management already possesses.”⁵ This recognition of a union’s reliance on this particular method of communication has taken on even greater significance by virtue of the Supreme Court’s decision in *Lechmere, Inc. v. NLRB*, where the Court established the broad presumption that nonemployee union organizers do not have access to private property.⁶ The result is that, in virtually every circumstance, non-employee union organizers may only have access to employees through the use of the *Excelsior* list.

In view of the fundamental importance of the rule to the full and reasoned exercise of employees’ Section 7 rights, it is extremely important that the list be complete and accurate. Indeed, it is not uncommon, as in this case, for the election to be close. In such circumstances, a union’s lack of complete information as to the identity of each eligible voter could compromise its ability to communicate with a determinative number of voters, and, therefore, affect the outcome of the election.

Where the number of omitted names is determinative, the question of whether the omissions resulted from bad faith or gross negligence is irrelevant. The Board has long recognized that the *Excelsior* rule is essentially prophylactic and thus the potential harm from list omissions is deemed so great as to warrant the strict application of the rule in order to ensure that there will be a conscientious effort by the employer to comply.⁷ In the instant case, where the ballots of the omitted employees are determinative, the prejudicial effect on the election is clear.

I also agree with longstanding Board precedent that issues concerning a union’s actual access to employees, or the extent to which employees omitted from the *Excelsior* list are aware of election issues and arguments, are not litigable matters in applying the *Excel-*

sior rule.⁸ In *Excelsior*, the Board determined that the appropriate administrative mechanism for achieving a full and informed electorate was to impose a duty on the employer of producing a complete list of names and addresses for all eligible voters.⁹ To allow inquiry and additional litigation over such issues as a union’s actual access to the omitted employees, or the omitted employees’ actual knowledge of the campaign issues, would “spawn an administrative monstrosity.”¹⁰

In sum, I believe the Employer’s omission of four names from the *Excelsior* list warrants setting aside the election, regardless of whether the omissions were the result of conduct demonstrating bad faith or gross negligence, because the omitted employees were determinative votes.

⁸ *Thrifty Auto Parts*, supra.

⁹ *Sonfarrel, Inc.*, 188 NLRB 969, 970 (1971).

¹⁰ *Id.*

APPENDIX

REPORT AND RECOMMENDATION ON OBJECTION TO ELECTION

Pursuant to a Stipulated Election Agreement approved by me on September 19, 1996, an election by secret ballot was conducted on October 24, 1996, in the unit described in paragraph 13 of the Agreement.

The tally of ballots, copies of which were made available to the parties at the conclusion of the election, showed the following results:

Approximate number of eligible voters	72
Void ballots	0
Votes cast for Petitioner	32
Votes cast against participating labor organization	26
Valid votes counted	58
Challenged ballots	6
Valid votes counted plus challenged ballots	64

The challenged ballots were determinative of the results of the election.

By letter dated December 20, 1996, I approved a stipulation executed by the parties to resolve the challenged ballots. The ballots were opened and counted and a revised tally of ballots was made available to the parties on December 30, 1995, which showed the following results:

Approximate number of eligible voters	78
Void ballots	0
Votes cast for Petitioner	32
Votes cast against participating labor organization	32
Valid votes counted	64
Challenged ballots	0
Valid votes counted plus challenged ballots	64

³ *Id.* at 1241.

⁴ *Id.* at 1240.

⁵ *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 767 (1969).

⁶ 502 U.S. 527 (1992). We have applied *Lechmere* and its logical implications to nonemployee union organizers’ attempts to have access to private property to reach the public as well as employees. See *Loehmann’s Plaza*, 316 NLRB 109 (1995); and *Leslie Homes, Inc.*, 316 NLRB 123 (1995).

⁷ *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994) (citing *Thrifty Auto Parts*, 295 NLRB 1118 (1989)).

On October 29, 1996, the Petitioner timely filed an objection¹ to conduct affecting the results of the election which alleges as follows:

The Employer omitted from the *Excelsior* List names and addresses of approximately five employees, which represents all of the employees within a particular classification, whom the Employer now maintains should have been part of the bargaining unit and should have been entitled to vote in the election. Because the Employer had maintained throughout that these employees were not part of the bargaining unit and because it did not include the employees, names and addresses on the *Excelsior* List, the Union was denied an opportunity to meet with the employees and campaign on the union's behalf.

Pursuant to paragraph 7 of the Stipulated Election Agreement and Section 102.69(c) of the Board's Rules and Regulations, an investigation of the Petitioner's objection was conducted under my direction and supervision. During the investigation, each party was afforded the opportunity to present witnesses and evidence relevant to the issues raised by the objection. The investigation disclosed and I report as follows:

The Objection

The Petitioner alleges that the Employer omitted the names of four² recreational aides from the list of names and addresses of the eligible voters in violation of the Board's rule in *Excelsior Underwear*, 156 NLRB 1236 (1966).

The Petitioner sought an election in a unit including all full-time and regular part-time LPNs, CNAs, dietary aides, maintenance employees, restorative medical assistants, cooks, and recreational aides, excluding clerical employees, guards and supervisors as defined in the Act. During prehearing discussions, the Employer contended, and the Petitioner agreed, that the cooks should not be included in the proposed bargaining unit. However, the parties agreed to include the recreational aides. The Stipulated Election Agreement included recreational aides in, and excluded cooks from, the bargaining unit.

After the election agreement was approved, the Employer submitted a list of names and addresses of the eligible voters to the Regional Office on September 25, 1996. The list was furnished to the Petitioner the same day. Subsequently, the Petitioner contacted the Regional Office and reported that the names of four cooks were on the eligibility list, while none of the recreational aides were on the list. The Employer agreed that the names of the cooks were erroneously placed on the list, but stated that it employed no recreational aides, and it submitted a revised list of names and addresses of eligible voters to the Regional Office on September 26, 1996, omitting the cooks.

On October 8, 1996, two employees who identified themselves as recreational aides attended an organizational meeting conducted by the Petitioner. The Petitioner contacted the Regional Office and inquired as to the eligibility of these

employees. In response to an inquiry from the Board agent handling the case, the Employer's counsel reported that it employed four activities assistant, but that it considered them to be professional employees and therefore not in the bargaining unit. These four employees appeared to vote and were challenged by the Board agent conducting the election because their names did not appear on the eligibility list. Their votes, along with two other ballots challenged on other grounds, were determinative of the results of the election. Subsequently, in a stipulation to resolve the determinative challenged ballots, the parties agreed that the job classification of activities assistant "is identical to that of recreational aides, the job category included in the proposed bargaining unit agreed to by the parties," and that all four employees were eligible voters.

During the investigation of the objection, two recreational aides stated, that about 10 days prior to the election, Supervisor Mary Lee Luce informed them that they were eligible voters. She encouraged them to vote and instructed them as to the mechanics of the challenged ballot procedure.

The Board has held that failure to comply substantially with the *Excelsior* requirement to provide a complete list of the names and addresses of eligible voters will constitute grounds for setting aside an election whenever proper objections are filed. The policies behind the rule are twofold: (1) to insure that the electorate is informed by allowing all involved parties to have the opportunity to communicate with the electorate; and (2) to speed up the process of resolving questions concerning representation by minimizing the amount of challenges to the election results based on a party's lack of knowledge as to a voter's identity. *Excelsior Underwear*, supra at 1242-1243; and *Women in Crisis Counseling*, 312 NLRB 589 (1993). In considering objections based on an employer's alleged failure to comply with the *Excelsior* rule, the Board examines both the percentage of names left off the list and whether the Employer's conduct demonstrated bad faith or gross negligence. *Thrifty Auto Parts*, 295 NLRB 1118 (1989); and *Lobster House*, 186 NLRB 148 (1970).

In the instant case, the Employer executed a Stipulated Election Agreement that included recreational aides, but then took the position that it had no such employees. The Employer subsequently contended that its four activities assistants, who performed the same duties as those of recreational aides, were professional employees and that it omitted these individuals from the list for this reason. While maintaining that these employees were not eligible voters, one of the Employer's supervisors informed two of them that they were eligible, encouraged them to vote, and explained the challenged ballot procedure to them. Finally, after the election, the Employer admitted that the activities aides were eligible to vote all along, and agreed that they were, in fact, the same as recreational aides.

The foregoing facts demonstrate that, at the time the parties entered into the election agreement, there was no confusion as to the eligibility of the recreational aides/activities assistants who were explicitly included in the unit. In these circumstances, the Employer's decision to leave their names off the eligibility list was not the result of mere negligence or a good-faith mistake. Even when apprised of the omission of the recreational aides/activities assistants, it never submitted a corrected list to clear up the confusion it had created. Based on the foregoing, I find that the Employer did not sub-

¹ The Petitioner filed a second objection which it withdrew during the course of the investigation.

² Although the objection says five names were omitted, during the investigation, only four omissions were identified.

stantially comply with the *Excelsior* requirement, and that the Petitioner was therefore deprived of a meaningful opportunity to communicate with the entire voting unit. The Board has consistently viewed the omission of names as more serious than inaccuracies in addresses, because a party that is unaware of an employee's name suffers an obvious and pronounced disadvantage in communicating with that person by any means, and in assessing prior to the election whether that person is eligible to vote. *Women in Crisis Counseling*, supra. Accordingly, I find that the Petitioner's objection has merit. *Thrifty Auto Parts*, supra; see also *North Macon Health Care Facility*, 315 NLRB 359 (1995).

RECOMMENDATION

As I have found that the Petitioner's objection has merit, I recommend that it be sustained and that a second election be directed.³

³Under the provisions of Sec. 102.69 of the Board's Rules and Regulations, exceptions to this report may be filed with the Board in Washington, D.C. Exceptions must be received by the Board in Washington by February 13, 1997. Pursuant to Sec. 102.69(g), affidavits and other documents which a party has timely submitted to the Regional Director in support of objections or challenges are not part of the record unless included in the Regional Director's report, or appended to the exceptions or opposition thereto, which a party submits to the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not included in the report shall preclude a party from relying on the evidence in any subsequent related unfair labor practice proceeding.